

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

AMERICAN ELECTRIC POWER COMPANY, INC.

Administrative Proceeding
File No. 3-11616

**RESPONSE OF AMERICAN ELECTRIC POWER COMPANY, INC.
TO REQUEST FOR CERTIFICATION OF INTERLOCUTORY APPEAL
AND STAY OF THE PROCEDURAL SCHEDULE**

American Electric Power Company, Inc. (“AEP”) hereby responds to the request of Public Citizen, Inc. for (1) certification of the Presiding Judge’s order denying Public Citizen full party status in this proceeding to the Commission for interlocutory review, and (2) a stay of the procedural schedule pending such interlocutory review. AEP opposes both requests.

Rule 400(a) of the Commission’s Rules of Practice states that interlocutory appeals are disfavored, and that the Commission will hear an interlocutory appeal only in “extraordinary circumstances.” 17 C.F.R. § 201.400(a) (2004). Rule 400(c) further provides that a hearing officer should consider certifying a ruling to the Commission for interlocutory review only where the ruling involves a “controlling question of law” *and* “immediate review . . . may materially advance the completion of the proceeding.” *Id.* § 201.400(c). Neither of these standards has been met here.

Although Public Citizen contends that the Presiding Judge committed legal error in not granting it full party status under Rule 210(b), Public Citizen does not qualify for

intervention as of right under Rule 210(b)(2), and Your Honor therefore had discretion under the rules to determine the scope of Public Citizen's participation in this proceeding. Your Honor's exercise of discretion as to the scope and form of an interested person's participation is neither extraordinary nor does it raise any "controlling question of law" that would justify certification under Rule 400(c).

Your Honor properly exercised this discretion here. Public Citizen did not actively participate in the proceeding to review AEP's merger application when it was first before the Commission,¹ and did not participate at all in the appellate proceeding that resulted in the instant remand. Public Citizen offered no reason for expanding its participation in this second, narrower round of Commission review, and its intervention motion (including its response to AEP's opposition) clearly signaled that Public Citizen was more interested in generic issues relating to the Commission's administration of the Public Utility Holding Company Act ("PUHCA") than in the particular factual matters at issue in this proceeding.

Denial of full party status was also consistent with Public Citizen's insufficient statement of its interest. Public Citizen contends that its participation is required because, in its view, the Commission's Division of Investment Management ("Division") lacks the expertise to perform its statutory role. However, it is the Commission, not Public Citizen, that is charged with interpreting and administering PUHCA. The Division has capably reviewed dozens of merger and other corporate transactions under the PUHCA involving economic and technical issues in the electric industry without Public Citizen's assistance. In

¹ In fact, Public Citizen did not even request a hearing in the original proceeding. *See In re Am. Elec. Power Co., Inc. and Central & South West Corp.*, SEC Release No. 35-27186, at § I.C (June 14, 2000).

any event, Your Honor already granted Public Citizen the opportunity to present testimony and submit briefs, so the Commission will have the benefit in reviewing this merger transaction of any special expertise that Public Citizen properly offers.

Public Citizen nevertheless contends that certification is necessary because, it claims, the Presiding Judge misconstrued its intervention request and therefore did not originally rule on whether Public Citizen is entitled to full party status. This reasoning is erroneous. A measured review of the record makes clear that the Presiding Judge decided the appropriate level of participation in the proceeding by Public Citizen in the first instance. Public Citizen's original motion to intervene was ambiguous in its request for relief.² Any such ambiguity, however, merely confirms that the Presiding Judge properly determined that Public Citizen should be allowed to participate only on a limited basis as a non-party in this remand stage, particularly given Public Citizen's limited involvement in the initial proceeding before the Commission.

Of course, whether Public Citizen originally intended to request full party or limited participant status is irrelevant, because the Presiding Judge had discretion to limit Public Citizen's participation status regardless of which form of participation it sought. *See* 17 C.F.R. § 201.210(f).³ Here, the Presiding Judge was well within his discretion in deciding

² While the first sentence of this pleading indicated that Public Citizen was seeking to intervene "[p]ursuant to . . . Rule 210(b)," Public Citizen later stated that "this proceeding is a 'matter affecting [the] interests' of Public Citizen and its members within the meaning of 17 CFR §201.210(c)," Motion to Intervene at 1, 3.

³ For the same reason, Public Citizen is wrong in suggesting that the limitation on its ability to cross-examine AEP's witnesses constitutes a "substantial denial of due process." Motion for Certification at 4. Rule 210(f) specifically gives the Presiding Judge discretion to "impose such terms and conditions on the participation of any person in any proceeding as it may deem necessary or appropriate." 17 C.F.R. § 201.210(f). Likewise, Rule 326 gives the Presiding Judge discretion to limit cross-examination conducted by a party. *See id.* § 210.326. It thus follows that cross-

not to make Public Citizen a full party and instead to grant it limited participation rights in a manner that would not burden the proceeding. Notwithstanding its conclusory assertions, nowhere in its intervention papers did Public Citizen make the showing required under Section 210(b) for obtaining full party status. Accordingly, if Public Citizen did not clearly express an intention to be made a full party to this proceeding in its original intervention filing, it has no one to blame but itself, and it is too late for Public Citizen to make any such showing under Section 210(b) at this stage of the proceeding.


Indeed, Public Citizen's request for interlocutory relief also should be denied because granting this relief will delay the completion of this proceeding in contravention of Rule 400(c), and the delay can be attributed to Public Citizen's own inaction. Your Honor's order granting Public Citizen limited participant status was issued on October 22, 2004. For reasons that have not been offered, Public Citizen sat on its rights for nearly two months before filing the instant motion, thereby creating the necessity for requesting a stay of the procedural schedule only weeks before the hearing is scheduled to commence. Rule 400(c) confirms that AEP and the other parties should not have to revise their schedules and accept a delay in the completion of this proceeding because of Public Citizen's failure to pursue its rights on a timely basis.

examination also may be limited for a non-party participant. Here, moreover, due process is assured, because AEP's witnesses are subject to cross-examination by the Division, as well as by intervenors American Public Power Association and National Rural Electric Cooperative Association.

For all of the above reasons, AEP respectfully urges the Presiding Judge to deny Public Citizen's request for a stay and for certification of an interlocutory appeal.

Respectfully submitted,

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